IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN LOTT	:	CIVIL ACTION
	:	
v.	:	
	:	
CHENEY UNIVERSITY OF PENNSYLVANIA, et al.	:	NO. 00-5283

MEMORANDUM AND ORDER

BECHTLE, J. MAY ,2001

Presently before the court is the motion of defendants Cheney University of Pennsylvania ("Cheney"), the State System of Higher Education ("SSHE"), the Board of Governors of SSHE, Dr. W. Clinton Pettus, F. Eugene Dixon, Cheney University Council of Trustees, Robert Bogle, Dr. Leon White, Harold Johnson, Karl Brockenbrough, and Dr. Joan Barax[1] (collectively, "Defendants") to dismiss plaintiff John Lott's ("Plaintiff") Complaint and the response thereto. For the reasons set forth below, said motion will be granted.

I. BACKGROUND

Plaintiff was a student at Cheney from the fall of 1994 until the fall/winter of 1998. (Compl. ¶ 21.) Sometime before the fall of 1997, he was elected President of Cheney's Student Government Cooperative Association ("SGCA"). Id. ¶ 22. Plaintiff alleges that after he disputed the University's

[1] The Complaint names Dr. Joan Barrax, however, Defendants' moving papers refer to Dr. Joan Barax. The court will follow the latter spelling.

administration of student activity fees, Dr. W. Clinton Pettus, Cheney's President, orchestrated Plaintiff's impeachment. Id. ¶¶ 26-27. Plaintiff appealed and was recognized as President in December 1997. Id. ¶ 34. Plaintiff also asserts that, from January 1998 to October 17, 1998, defendants Cheney, Pettus, White and/or Johnson kicked Plaintiff off the wrestling team, reneged on their promise of scholarship funds, overturned the conviction of a student (Charnetta Brunson) who had injured Plaintiff in various ways,[2] denied his right to speak and wear his Presidential Sash at graduation, delayed awarding him a degree, failed to give him a grade thereby lowering his grade point average ("GPA") and thwarting his opportunity to obtain a full scholarship to Temple Law School, banned him from campus and ordered him to leave homecoming festivities. Id. ¶¶ 43-65.

On October 20, 1998, Pettus advised Plaintiff that he was no longer a student at Cheney. Id. ¶ 66.[3] On November 23, 1998, Pettus again met with Plaintiff and told him that, absent a court order, he could not have the same privileges as any other alumnus or member of the community. Id. ¶ 68. On November 30, 1998, Plaintiff received a refund for the fall 1998 class that he was

[2] Plaintiff alleges that Brunson, Vice President of the SGCA, hid a strongbox containing SGCA funds and threw feces and urine under his door. Id. ¶¶ 45, 47 & 48.

[3] Due to an error, Plaintiff's Complaint contains two paragraphs numbered 66.

not permitted to attend. Id. ¶ 69. In January 1999, Plaintiff was notified that the class for which he had not received a grade (apparently, a class that Plaintiff attended in the spring of 1998) would be removed from his transcript, thereby correcting his GPA, but denying him the credit he deserved. Id. ¶¶ 53-54 & 70.

On October 18, 2000, Plaintiff commenced this case pursuant to 42 U.S.C. §§ 1983 and 1985, asserting claims under the First Amendment (freedom of speech) and Fourteenth Amendment (due process).[4] He also asserts state law claims for breach of contract and civil conspiracy. Defendants filed the instant motion to dismiss on December 21, 2000. Plaintiff filed a response on February 6, 2001.

II. LEGAL STANDARD

For the purposes of a motion to dismiss, the court must accept as true all well-pleaded allegations of fact in a plaintiff's complaint, construe the complaint in the light most favorable to the plaintiff, and determine whether "under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d

[4] Plaintiff's Complaint also asserts that his action arises under the Fourth Amendment and 42 U.S.C. §§ 1981 and 1986. (Compl. ¶ 2.) However, none of these claims are included in any of the enumerated counts. See Compl., Counts I - VIII.

663, 665-66 (3d Cir. 1988). The court may also consider "matters of public record, orders, exhibits attached to the Complaint and items appearing in the record of the case." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994) (citations omitted). The court, however, need not accept as true legal conclusions or unwarranted factual inferences. Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997) (citations omitted). A complaint is properly dismissed only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

III. DISCUSSION

Defendants seek dismissal of Plaintiff's Complaint for, inter alia, Plaintiff's failure to comply with the statute of limitations and failure to state cognizable claims under 42 U.S.C. §§ 1983 and 1985. The court will first address the statute of limitations and then the viability of Plaintiff's federal claims.[5]

A. Statute of Limitations

Defendants contend that most of Plaintiff's claims are barred by the applicable statute of limitations.

[5] The court has jurisdiction over Plaintiff's federal claims under 28 U.S.C. § 1331 and supplemental jurisdiction over his state claims pursuant to 28 U.S.C. § 1367.

Generally, a statute of limitations defense cannot be used in the context of a Rule 12(b)(6) motion to dismiss. However, "an exception is made where the complaint facially shows noncompliance with the limitations period and the affirmative defense clearly appears on the face of the pleading." Oshiver, 38 F.3d at 1384 n.1.

Although there is no federal statute of limitations, Section 1983 and 1985 claims are governed by the relevant state's statute of limitations. Trautman v. Lagalski, 28 F. Supp. 2d 327, 328 (W.D. Pa. 1998) (citations omitted). Here, it is undisputed that Pennsylvania's two-year statute of limitations applies. 42 Pa. Cons. Stat. Ann. § 5524; Sameric Corp. of Del., Inc. v. City of Philadelphia, 142 F.3d 582, 598-99 (3d Cir. 1998) (applying two-year limitation to § 1983 cause of action); Bougher v. Univ. of Pittsburgh, 882 F.2d 74, 78 (3d Cir. 1989) (applying two-year limitation to §§ 1983 and 1985 claims).

Plaintiff commenced this action on October 18, 2000 – more than two years after Defendants allegedly impeached Plaintiff, reneged on their promise of scholarship funds, kicked Plaintiff off the wrestling team, denied his right to speak at graduation, banned him from campus and ordered him to leave homecoming festivities. (Compl. ¶¶ 43-65.) Where the conduct Plaintiff complains of occurs outside the limitations period, the claims are barred. Young v. City of Allentown, 882 F. Supp. 1490, 1493

(E.D. Pa. 1995), aff'd, 66 F.3d 314 (3rd Cir. 1995) (table).

Plaintiff, however, asserts that because the Defendants' discriminatory conduct was continuing in nature, the limitations period should be tolled until the last act evidencing the continuing practice. (Pl.'s Mem. of Law in Supp. of Pl.'s Resp. to Mot. to Dismiss ("Pl.'s Opp'n") at unnumbered p. 2.) Plaintiff asserts that the last acts of discrimination occurred on October 20, 1998, when Pettus told Plaintiff that he was no longer a student at Cheney and November 23, 1998, when Pettus informed Plaintiff that he would have to sue to have the privileges of any other alumni or member of the community.[6] See id. (citing Compl. ¶¶ 66 & 68.)

Under the continuing violation theory, Plaintiff could pursue his claim for discriminatory conduct that began prior to the filing period if he can "demonstrate that the act is part of an ongoing practice or pattern of discrimination." Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 481 (3d Cir. 1997) (internal quotations and citations omitted) (applying theory in Title VII

---

[6] Although the parties have not briefed the issue, the court will assume, arguendo, the applicability of the continuing violation theory to the instant case. See DiBartolo v. City of Philadelphia, No. Civ. A. 99-1734, 2000 WL 217746, at *4 (E.D. Pa. Feb. 15, 2000) (applying continuous violation theory to § 1983 claim); but see Young, 882 F. Supp. at 1496 n.7 (noting that Third Circuit has not decided applicability of theory to § 1983 cases); see also Rassam v. San Juan Coll. Bd., 113 F.3d 1247 (10th Cir. 1997) (table), available at 1997 WL 253048, at **3 (citing cases) (noting reluctance of courts to apply continuing violation doctrine outside employment discrimination context).

context). To establish the applicability of the continuing violation theory, a plaintiff must demonstrate that: (1) at least one discriminatory act occurred within the limitations period; and (2) the discriminatory conduct is more than the occurrence of isolated or sporadic acts of intentional discrimination. Id. (citing West v. Philadelphia Elec. Co., 45 F.3d 744, 754-55 (3d Cir. 1995)). "[A] plaintiff may not rely on the continuing violation theory to advance claims about isolated instances of discrimination concluded in the past, even though the effects persist into the present." Courtney v. LaSalle Univ., 124 F.3d 499, 505 (3d Cir. 1997) (citation omitted). Further, the doctrine "is to be narrowly applied, and is not intended to excuse plaintiffs from diligently pursuing their claims." Rassam, 1997 WL 253048, at **3.

The record shows that Plaintiff was impeached in the fall of 1997, after a dispute with Defendants over the administration of the SGCA's funding. (Compl. ¶¶ 22-34.) Plaintiff appealed his impeachment and was recognized as SGCA President in December 1997. Id. ¶ 34.

The bulk of incidents about which Plaintiff complains occurred between January 1998 and October 17, 1998. Id. ¶¶ 43-65. Specifically, it appears that Plaintiff was kicked off the wrestling team on January 20, 1998. Id. ¶ 43. On February 12, 1998 and February 13, 1998, his room was robbed and vandalized.

Id. ¶¶ 46-48. Brunson was convicted for the vandalism, but Defendants overturned her conviction. Id. ¶¶ 48-49. Defendants allegedly reneged on their promise of scholarship funds. Id. ¶¶ 39 & 51. Plaintiff apparently received his degree from Cheney on July 13, 1998. Id. ¶ 57. On August 21, 1998, in an effort to improve his grade point average and "make him feel that he accomplished all the required credits," Plaintiff re-enrolled in the class for which he did not receive a grade in the spring of 1997. Id. ¶¶ 57 & 60. However, on August 22, 1998, Plaintiff was banned from campus. Id. ¶ 61.

On September 16, 1998, Plaintiff wrote a letter to Pettus and contacted White, informing Defendants that they were "breaking the law." Id. ¶ 64. Plaintiff was ordered to leave homecoming festivities on October 17, 1998, and on October 20, 1998, Pettus told Plaintiff that he was no longer a student. Id. ¶¶ 65& 66. Finally, on November 23, 1998, Pettus met with Plaintiff, informing him that, absent a court order, he could not have "the same privileges as any other alumn[us] or . . . member of the community." Id. ¶ 68.

The court finds that the continuing violation theory does not apply to the facts presented. Plaintiff has failed to demonstrate that the October 20, 1998 and November 23, 1998 conversations with Pettus were part of an ongoing practice or pattern of discrimination. Plaintiff instead shows a series of

isolated or sporadic acts. As stated supra, "[a] plaintiff may not rely on the continuing violation theory to advance claims about isolated instances of discrimination concluded in the past." Courtney, 124 F.3d at 505.

Further, as stated supra, the continuing violation doctrine does not "excuse plaintiffs from diligently pursuing their claims." Rassam, 1997 WL 253048, at **3. A cause of action accrues when the plaintiff is aware, or should be aware, of the existence of and source of an injury. Sameric Corp., 142 F.3d at 599. The statute of limitations began to run and Plaintiff's cause of action accrued when he "knew or had reason to know of the injury that constitutes the basis of [his] action." Elliott, Reihner, Siedzikowski & Egan, P.C. v. Pennsylvania Employees Benefit Trust Fund, No. Civ. A. 00-4036, 2001 WL 323213, at *6 (E.D. Pa. March 30, 2001) (citations and internal quotations omitted). Thus, his claim accrued "upon [his] awareness of actual injury, not upon awareness that [his] injury constitute[d] a legal wrong." Id. (citations and internal quotations omitted).

Here, Plaintiff knew of his cause of action against Defendants well before October 18, 1998 - in fact, Plaintiff informed Defendants of his belief that they were "breaking the law" on September 16, 1998. (Compl. ¶ 64.) The continuing violation theory, premised on the equitable notion that the statute of limitations should not begin to run until a reasonable

person would be aware that his rights have been violated, "will not overcome the relevant statute of limitations if prior events should have alerted a reasonable person to act." Cowell v. Palmer Township, No. Civ. A. 99-3216, 1999 WL 1212180, at *3 (E.D. Pa. Dec. 16, 1999) (citations omitted). In this case, Plaintiff failed to file his Complaint until October 18, 2000, more than two years after the majority of the incidents at issue. Accordingly, the court finds that the statute of limitations bars the claims that arose before October 18, 1998.

B. Plaintiff's Remaining Federal Claims

Because of the two year statute of limitations, Plaintiff's remaining federal claims, if any, arise from his October 20, 1998 and November 23, 1998 conversations with Pettus during which Plaintiff was advised that he was no longer a student and would not receive the same privileges as any other alumnus or community member without a court order. (Compl. ¶¶ 66 & 68.)

Under 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983. Section 1983 "is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." Bristow v. Clevenger, 80 F.

Supp. 2d 421, 429 (M.D. Pa. 2000) (citing Graham v. Connor, 490 U.S. 386, 393-94 (1989)) (internal quotations omitted). The plaintiff in a Section 1983 claim must prove: (1) that the defendants acted under color of state law; (2) depriving the plaintiff of a right secured under the Constitution or federal law; and (3) damages. Samerik, 142 F.3d at 590.

Plaintiff asserts that his First and Fourteenth Amendment rights to "attend classes and be awarded credits . . . without infringement of his First Amendment rights of access to the courts and right to appeal" and "to due process of the law . . . [and] liberty to move freely at University functions" were violated when Pettus told Plaintiff that he was no longer a student and advised him that he would need a court order to obtain the same privileges as any other alumnus or member of the community. (Compl. ¶¶ 72 & 92.) Plaintiff cites no authority to support his argument that these assertions raise cognizable First or Fourteenth Amendment claims.[7] His Complaint merely alleges that Pettus told Plaintiff that he was not a student or alumnus of Cheney, refunded the money Plaintiff paid for a course that he

[7] In his opposition to Defendants' motion to dismiss, Plaintiff contends that if the continuing violation theory does not apply to toll the statute of limitations, his Complaint nonetheless raises deprivations of constitutional dimensions occurring after October 18, 1998 because he was "illegally stop[ped] and seize[d]" at a school football game. (Pl.'s Opp'n at unnumbered p. 4.) However, according to the Complaint, the incident to which Plaintiff apparently refers occurred during homecoming festivities on October 17, 1998. (Compl. ¶ 65.)

wanted to take, and then corrected Plaintiff's GPA by apparently removing an incomplete grade from Plaintiff's transcript. Id. ¶¶ 66 & 68-70. Thus, the court finds that the Complaint fails to state a cognizable Section 1983 claim.[8]

Plaintiff next alleges that Defendants conspired to interfere with his civil rights, violating 42 U.S.C. § 1985. (Compl. ¶¶ 110-113.) To establish a Section 1985(3) violation, a plaintiff must prove: (1) a conspiracy; (2) motivated by a racial or class based discriminatory animus, designed to deprive, either directly or indirectly, any person or class of persons the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the deprivation of any right or privilege of a citizen of the United States. Lake v. Arnold, 112 F.3d 682, 685 (3d Cir. 1997),

---

[8] In addition, as to Plaintiff's claims against defendants Dixon, Bogle, Brockenbrough and Barax, the court notes that Plaintiff merely identifies these individuals by their titles and office locations. (Compl. ¶¶ 13 & 15-20.) However, a state official cannot be held liable under Section 1983 unless he participated in or had personal knowledge of and acquiesced in the alleged wrongdoing. Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988). To be held liable, a defendant must be a "moving force" behind the alleged deprivation. DiBartolo v. City of Philadelphia, No. Civ. A. 99-1734, 2000 WL 217746, at *3 (E.D. Pa. Feb. 15, 2000) (citing City of Canton v. Harris, 109 S. Ct. 1197, 1205 (1989)). An individual is not a "moving force" unless he "has exhibited [at least] deliberate indifference to the plight of the person deprived." Id. (citing Sample v. Diecks, 885 F.2d 1099, 1118 (3d Cir. 1989)).

Plaintiff does not allege that defendants Dixon, Bogle, Brockenbrough or Barax had direct involvement or that they took any discriminatory or retaliatory actions against him. Thus, all counts will be dismissed as to these defendants.

vacated in part on other grounds by 232 F.3d 360 (3d Cir. 2000); Moyer v. North Wales, Civ. No. 00-1092, 2001 WL 73428, at *3 (E.D. Pa. Jan. 25, 2001) (citations omitted).

Plaintiff's Section 1985 claim must fail because, as stated supra, he has not shown the deprivation of any constitutional right.[9] Thus, the court finds that Plaintiff has failed to state a cognizable claim under Section 1985.

C. Plaintiff's State Claims

When a federal court has dismissed all claims over which it has original jurisdiction, it should ordinarily decline to exercise supplemental jurisdiction over state law claims. Cowell, 1999 WL 1212180, at *3 (citing United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966) & 28 U.S.C. § 1367(c)). Thus, the court will dismiss Plaintiff's remaining claims without prejudice.

IV. CONCLUSION

For the reasons set forth above, the court will grant Defendants' motion to dismiss.

An appropriate Order follows.

---

[9] Further, there is no suggestion of discriminatory animus in the Complaint. See Kot v. Stolle, Nos. CIV. A. 91-3509 & CIV. A. 92-5120, 1993 WL 293887, at *3 (E.D. Pa. Aug. 2, 1993) (citing Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)) (stating that § 1985(3) violation requires "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action").

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN LOTT	:	CIVIL ACTION
	:	
v.	:	
	:	
CHENEY UNIVERSITY OF PENNSYLVANIA, et al.	:	NO. 00-5283

ORDER

AND NOW, TO WIT, this day of May, 2001, upon consideration of the motion of defendants Cheney University of Pennsylvania, the State System of Higher Education ("SSHE"), the Board of Governors of SSHE, Dr. W. Clinton Pettus, F. Eugene Dixon, Cheney University Council of Trustees, Robert Bogle, Dr. Leon White, Harold Johnson, Karl Brockenbrough, and Dr. Joan Barax to dismiss and plaintiff John Lott's ("Plaintiff") response thereto, IT IS ORDERED that said motion is GRANTED:

(1) Counts I through V of Plaintiff's Complaint are DISMISSED; and

(2) Plaintiff's remaining state law claims are DISMISSED WITHOUT PREJUDICE.

_____
LOUIS C. BECHTLE, J.